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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Richard Seeborg, Judge

ANIBAL RODRIGUEZ, et al.,

Plaintiffs,

VS.

**NO. C 20-04688 RS**

GOOGLE, LLC,

**Defendant:**

San Francisco, California

Thursday, October 5, 2023

## **TRANSCRIPT OF PROCEEDINGS**

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21 United States District Court - Official Reporter

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1      Thursday - October 5, 2023

1:28 p.m.

2      P R O C E E D I N G S

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4      **THE CLERK:** Calling case 20-CV-4688, Rodriguez versus  
5      Google.

6      Counsel, please come forward and state your appearances.

7      **MR. MAO:** Good afternoon, Your Honor, Mark Mao, Boies  
8      Schiller Flexner, for the Plaintiff. And with me is -- are my  
9      colleagues James Lee, Mr. -- sorry, Mr. Yanchunis from Morgan  
10     and Morgan, Mr. Ryan Sila over at Susman Godfrey, and also my  
11     colleague Logan over at Boies Schiller Flexner.

12     **THE COURT:** Good morning or good afternoon.

13     **MR. HUR:** Good afternoon, Your Honor, Ben Hur from  
14     Willkie Farr & Gallagher for Defendant Google. I'm here with  
15     my colleagues Simona Agnolucci, Eduardo Santacana, Noorjahan  
16     Rahman, Argemira Florez and Harris Mateen.

17     Mr. Santacana will be handling the argument this  
18     afternoon.

19     **THE COURT:** Good afternoon. Let me start on -- I  
20     don't mean to start on a sour note, but I'm compelled to bring  
21     this up.

22     Sealing, one of my least favorite things. You know, the  
23     rule in the Ninth Circuit is quite clear that sealing is very  
24     limited. It is limited to sensitive personal information, real  
25     trade secrets, social security numbers, things of that nature.

1 It is not, simply what parties would prefer, is not publicly  
2 out there.

3 And it is really frustrating for -- on the Court's side of  
4 things when people just seal everything and don't go through  
5 the process of really trying to explain why certain things need  
6 to be sealed.

7 In this case an entire, as I understand it, expert report  
8 was sealed. Well, that's ridiculous.

9 So, what I'm going to do is I'm going to deny all of the  
10 sealing requests, but I will give you a chance to come back and  
11 give me an appropriate request limited to really appropriately  
12 sealed material with an explanation. And you all know it  
13 cannot be "Well, the parties have designated this as highly  
14 confidential." That is expressly disfavored as an argument.

15 And so, I will let you have another chance at it. My  
16 colleague Judge Hamilton just denies all sealing requests. And  
17 I have to say the more I deal with this, the more I find that  
18 an attractive option.

19 But you have got to start over again. I'm not going to  
20 spend the time to try to glean really what is appropriately  
21 sealable or not.

22 So, it also makes it very difficult for me to write an  
23 order on some of these when vast swaths of this are sealed.  
24 So, we leave it there okay.

25 **MR. SANTACANA:** Sure, Your Honor. I just wanted to

1 clarify one point.

2           **THE COURT:** Yes.

3           **MR. SANTACANA:** So I think there may be a  
4 misunderstanding. We -- in furtherance of sealing as little as  
5 possible, we filed a stipulation with the Court so that we  
6 could take a little bit more time to make sure we were only  
7 sealing what was absolutely necessary. So there is no pending  
8 sealing request, I think, at this point.

9           **THE COURT:** I thought there was a sealing request from  
10 the Plaintiffs, wasn't there?

11           **MR. SILA:** Your Honor, I think that our only sealing  
12 request was on behalf of Google's confidential material which  
13 we wanted to allow Google the time to go through the  
14 necessary --

15           **THE COURT:** All right. Great.

16           **MR. SILA:** So we will take your words to heart and  
17 make our submissions.

18           **THE COURT:** All right. Okay. So I don't need to deny  
19 anything but the admonitions hold true. I want a very limited  
20 sealing.

21           **MR. MAO:** Understood, Your Honor. Thanks.

22           **MR. SILA:** Thank you.

23           **THE COURT:** Now, let me talk a bit about the motions  
24 that are pending. We have a motion to certify. Then we also  
25 have a Daubert motion to exclude Mr. Lasinski.

1       As to the second motion, while the Defendants have  
2 identified, you know, various areas that are ripe for robust  
3 cross-examination, my view is that what the expert is offering  
4 is not beyond the pale as to warrant closing the gate.

5       So, you know, certainly I will let the Defendants have an  
6 opportunity to say what they want; but to give you the benefit  
7 of my tentative views, I think almost -- I think the arguments  
8 you make are arguments as to where you think there are problems  
9 that you can elucidate on cross-examination, but it is not a  
10 Daubert problem in my view.

11       As to the motion to certify, the principal battle, as is  
12 often the case, seems to go to whether Plaintiffs have  
13 sufficiently demonstrated under (b) (3) whether or not common  
14 issues will predominate with respect to the two classes that  
15 they propose.

16       Candidly my view is that they have done so, but the  
17 parties can focus on that question in our discussion.

18       Because I'm inclined in favor of the Plaintiffs, let me  
19 let the Defendants start.

20       I recognize the Plaintiffs have the burden, at least the  
21 initial burden with respect to class cert. But that said, let  
22 me go ahead and let the Defense start the process.

23           **MR. MAO:** Sorry, Your Honor. May I ask? Do you want  
24 to know who is going to be arguing?

25           **THE COURT:** Not particularly.

**MR. MAO:** Okay. Thank you, Your Honor.

**THE COURT:** So, go ahead.

(Pause in proceedings.)

**THE COURT:** And it's okay to have PowerPoints or that.

I don't like PowerPoints in arguments. I know it is antiquated, perhaps, approach because this is not a lecture.

So I will let you use them. But for future reference, don't give me PowerPoints on every argument that we have. I don't prefer them.

**MR. MAO:** Your Honor, may I just -- just make a real quick record, which is that we provided our PowerPoint about an hour or 45 minutes before the hearing so that they had a chance to examine that. We were literally just handed that, so I have not had --

**THE COURT:** That's precisely why I don't like these PowerPoints.

**MR. MAO:** I understand.

**THE COURT:** I don't want to have a fight about the PowerPoints in this. This is a motion argument. This is a back-and-forth about these issues. It's not, you know, a claim construction where people are going through -- and no one has ever in my experience gone through their whole thing because I stop them and ask questions.

So I'm not going to entertain any discussion about you guys fighting about a PowerPoint. I don't care.

1           **MR. MAO:** Understand.

2           **THE COURT:** So, we will put that aside. Okay. Go  
3 ahead.

4           **MR. SANTACANA:** Good afternoon, Your Honor. And just  
5 to clarify, you want me to shut off the PowerPoint or --

6           **THE COURT:** If there are specific things you want to  
7 show me, do that and that's fine.

8           **MR. SANTACANA:** Just a couple of screenshots.

9           **THE COURT:** People show me exhibits and that's okay.  
10 What I don't like is people saying: "Okay, now we are going to  
11 go through the lecture." That I don't like.

12           **MR. SANTACANA:** I wouldn't presume to lecture you,  
13 Your Honor.

14           **THE COURT:** Okay. Go ahead.

15           **MR. SANTACANA:** So, Your Honor, I understand your  
16 tentatives, so I would like to walk through the main critical  
17 reasons why we think predominance is lacking here.

18           **THE COURT:** Okay.

19           **MR. SANTACANA:** This case is not like any of the other  
20 cases cited in the parties' briefs in that encompasses the use  
21 of analytics and ads products by one-and-a-half million apps  
22 and a hundred million people virtually.

23           And the theory of the case that Plaintiffs are pressing  
24 now is not the theory of the case that Your Honor allowed to  
25 proceed at the motion to dismiss stage.

1       So I want to make sure we are all clear on that they need  
2 to prove at a class trial if the class were to be certified.

3           They are arguing that the expectations that Google set up  
4 with the WAA button were uniform and that Google's technology  
5 contravened it, regardless of what each app told its users  
6 about how the technology would be implemented, regardless of  
7 how those apps actually implemented the technology, regardless  
8 of how each user behaved in the apps that they were using or  
9 even the types of apps that they were using, and regardless of  
10 how or even whether Google used the data at all.

11          At the start of the case the allegation was that Google  
12 was building marketing profiles with data collected from WAA  
13 off.

14           We are now at a point where the claim is --

15           **THE COURT:** Is there any question that Google is  
16 treating different customers differently? I mean, in other  
17 words -- again, our focus has got to be what's going to rise or  
18 fall on a class basis, not whether or not they have good  
19 arguments.

20           They may fail at summary judgment or various other points  
21 along the path. Why aren't we going to get classwide answers?  
22 That's what's not clear to me.

23           **MR. SANTACANA:** Okay. Well, I'm happy to walk through  
24 that, Your Honor. The classwide answers are the first place I  
25 would start are on the question of consent.

1       And a number of the courts in this district have held that  
2 express or implied consent can become problems for  
3 predominance.

4           **THE COURT:** Judge Gonzalez Rogers did. Who else has  
5 done that?

6           **MR. SANTACANA:** So on the consent question I would  
7 point Your Honor not just to Judge Gonzalez Rogers. I would  
8 point you to the *Google/Gmail* case that Judge Koh decided in  
9 2014.

10          In that case she certified some subclasses, but she  
11 refused to certify the one where universities were using  
12 Google's Gmail technology branded as their own e-mail for their  
13 students because the universities were making their own  
14 disclosures as required by --

15           **THE COURT:** Let me ask you: Who is -- the consents we  
16 are talking about, just so we are clear, are they consents with  
17 respect to Google or the third parties? Whose consents are you  
18 talking about?

19           **MR. SANTACANA:** The consent that will be an  
20 individualized inquiry is the consent that end users gave for  
21 the use of an app developer -- the app developer using Google's  
22 technology, right, to send Google data.

23           **THE COURT:** Right. And your contention is that they  
24 are consenting implicitly or explicitly to the third parties or  
25 to Google?

1           **MR. SANTACANA:** To both actually. So I don't think  
2 there is actually a dispute in the case that the class did  
3 consent to the underlying conduct, which is keeping records of  
4 advertising and keeping basic records of conversions, servicing  
5 analytics accounts.

6           The --

7           **THE COURT:** Let me stop you there. On that: Why  
8 isn't that a classwide question, whether or not the consents  
9 effectively get you off the hook or don't?

10          **MR. SANTACANA:** That question -- that question can be  
11 a classwide question, but that's not the theory of the case.

12          The theory of the case is that even though they gave those  
13 consents, they subsequently turned (s)WAA off which they say by  
14 conduct revoked their consent.

15          And they argue that we should read that WAA -- that WAA  
16 button as undoing the consent they had given in --

17          **THE COURT:** Isn't your reaction to that undoing  
18 classwide?

19          **MR. SANTACANA:** No.

20          **THE COURT:** You are not taking particular customers  
21 and saying we are going to treat them this way and other  
22 customers a different way with respect to the consent question,  
23 are you?

24          **MR. SANTACANA:** By "a customer," you are referring to  
25 app developers?

1           **THE COURT:** Yes.

2           **MR. SANTACANA:** So, I guess I don't totally understand  
3 your question.

4           **THE COURT:** Well, what I'm trying to understand is  
5 again this classwide idea. You're contending that this  
6 vitiating of consent, which you say they are now -- they turn  
7 on the off button and then they say that's being ignored;  
8 correct?

9           **MR. SANTACANA:** They say that. That's right.

10          **THE COURT:** That's what they say.

11          **MR. SANTACANA:** That's their theory.

12          **THE COURT:** Okay. And you are contending to me that  
13 that can't be answered -- that whether or not there's an  
14 actualable claim associated with that cannot be answered on a  
15 classwide basis.

16          **MR. SANTACANA:** Not based on the theory they are  
17 bringing.

18          **THE COURT:** Well, okay. Tell me why. I'm not sure  
19 I'm following.

20          **MR. SANTACANA:** So, clearly there is a way -- maybe  
21 this is what Your Honor is thinking. There is a way to simply  
22 look at the button, look at the contract, decide what they mean  
23 as a matter of law and move on. That can be done classwide.  
24 That's why contract classes are often certified.

25          This is not a contract class. This is a privacy class.

1 And in addition to that, the -- even in a contract case where  
2 there is extrinsic evidence that bears on the question of  
3 consent, courts refuse to certify. It's not just Judge  
4 Gonzalez Rogers or Google/Gmail.

5 It's Judge Tigar in *Hart* as well as Judge Tigar in  
6 *Opperman versus Path*, which is a case about the collection of  
7 data from an app on a phone.

8 And the reason is because we, Google, have a defense that  
9 is viable as to people who agreed to the terms of use which say  
10 "we keep records of things," then turned off WAA; and then  
11 agreed over and over again to binding terms of service with app  
12 after app after app where the app said: "In order to use our  
13 service, you agree to be bound by this and what I'm binding you  
14 by is that I'm going to use Google Analytics."

15 And the user says: "Yes, I would like to use the Lyft  
16 app, and I'm okay with you using Google Analytics."

17 Now, when the case started, the Plaintiffs' argument was  
18 this wasn't good enough because Google was secretly making  
19 marketing profiles and doing advertising and things. That's  
20 not the claim anymore.

21 The claim now is that Google is doing Google Analytics,  
22 which Plaintiffs agree to before and after they turn the WAA  
23 button off.

24 So I think the problem with saying we can just decide what  
25 it means and moving on is twofold. One is what I have just

1 discussed, which is that there is a lot of surrounding conduct  
2 that is going to bear for the fact-finder on that question.

3 And these -- these disclosures vary, *Lyft versus Alibaba*.  
4 Some of them say we will use analytics but they don't name  
5 Google.

6 Here is NPR. The Plaintiffs are effectively saying that  
7 NPR's agreement with its users on its app is overridden by an  
8 earlier revocation of consent the users had given to Google.

9 Now, I understand that's how they want to argue it. We  
10 have a right to question that Plaintiff about that, about their  
11 understanding. Why would they agree over and over and over  
12 over again to the terms of use like this if they did not intend  
13 to allow basic recordkeeping and analytic services to move  
14 forward?

15 The second problem I wanted to mention is: The Court can  
16 determine what written instruments mean if they are  
17 unambiguous.

18 But there's really not an argument that the WAA button  
19 unambiguously says what the Plaintiffs thought or what they say  
20 they thought. That's not really their argument anymore. It  
21 was when they were talking about personalized advertising  
22 because that's what WAA is talking about.

23 The WAA button says saved in your Google account. Turn it  
24 on, I save it in your Google account. Turn it off and I don't.

25 And Google defines over and over and over again what that

1 means. So these are just from the privacy policy, just the  
2 privacy policy. And yellow is the language that refers to the  
3 WAA button. Review and update your Google activity controls.  
4 That's going to control what is saved with your account. Click  
5 on that blue button. It takes you to the WAA page.

6 Here are some other things that Google says in the privacy  
7 policy. It says (as read:) "Associated with your Google  
8 account means we treat it as personal information."

9 There is no claim in this case -- in fact, their expert  
10 said Google has the best of intentions in attempting not to  
11 treat this data as personal information when WAA is turned off.

12 We say in the privacy policy that non-personally  
13 identifiable information is information that no longer reflects  
14 or references an individual.

15 We say that depending on your account settings, your  
16 activity and other sites and apps may be associated with your  
17 personal information.

18 These are the types of disclosures that are all over this  
19 case where Google is explaining its view of the world. I  
20 understand some people may be confused about it but Google's  
21 explaining its view.

22 They are saved to your Google account, which means it's  
23 about you; and then there is non-personal information which is  
24 pseudonomized.

25 **THE COURT:** I'm still perplexed at why -- just the way

1 you've described this clear, from your perspective, disclosure  
2 by Google.

3           **MR. SANTACANA:** Right.

4           **THE COURT:** You are not differentiating -- why is that  
5 not something that then again is going to be subject to some  
6 sort of classwide determination?

7           **MR. SANTACANA:** So this is why: In addition to what I  
8 just said, which is that the app disclosures from third-party  
9 apps --

10          **THE COURT:** I understand that.

11          **MR. SANTACANA:** -- are all variable.

12          **THE COURT:** I gotcha on that.

13          **MR. SANTACANA:** The question is: Has Google presented  
14 evidence that there's going to be varying understandings of the  
15 WAA button. And that's why it's talking about whether it is  
16 ambiguous.

17          It is not ambiguously in support of Plaintiffs' view --  
18 I'm sorry -- unambiguously. It can only support Plaintiffs'  
19 view on the merits if it is considered ambiguous.

20          So, Sal Cataldo, one of the four Plaintiffs, testified,  
21 and he said this is what he thought the button would do. He  
22 thought that if he turned the button off, Google wouldn't use  
23 WAA. --

24          **THE COURT:** But are you saying we think our  
25 disclosures are all unambiguous but at the same time certain

1 users, we need to determine whether or not they are  
2 individually confused by our unambiguous disclosures?

3 I mean, I don't -- I don't follow how if the argument is  
4 that Google's disclosures are so clear and unambiguous, then I  
5 don't see where this individualized perception comes into play.

6 **MR. SANTACANA:** Apart from the third-party app  
7 disclosures.

8 **THE COURT:** The third party -- I understand that  
9 argument. You are saying there are all these different third  
10 parties and they all have different, you know, caveats to use.  
11 And, you know, you can't -- you can't have a common -- because  
12 some people are at NPR and some people are at, whatever the  
13 other ones that you were showing me, I understand that  
14 argument.

15 **MR. SANTACANA:** Yeah.

16 **THE COURT:** But you now moved to another.

17 **MR. SANTACANA:** On the other argument. Just making  
18 sure we are on the same page.

19 **THE COURT:** Yeah.

20 **MR. SANTACANA:** So the reason is because of how  
21 California courts weigh invasion of privacy, and I think  
22 focusing on the claims -- the actual claims is critical.

23 *Kight* and *Hataishi* are two California Court of Appeal  
24 cases that look at this exact thing and they say --

25 **THE COURT:** Are these questions about what to certify?

1           **MR. SANTACANA:** They were.

2           **THE COURT:** Okay.

3           **MR. SANTACANA:** They were questions about whether  
4 to -- I mean, the Judge's Benchbook in California says don't  
5 certify invasion of privacy claims. It is not a good idea.  
6 There is no mass torts.

7           **THE COURT:** We are that simple. Go ahead.

8           **MR. SANTACANA:** Well, understood. And you have a  
9 different reading of Rule 23, but I don't think California is  
10 known to be less forgiving on class actions than federal court.

11          In any case, in *Kight* and *Hataishi* you have people whose  
12 actual phone calls are recorded. It's against the law.  
13 Everybody agrees it would be against the law if they were  
14 recorded without consent. There is a CIPA Section 632 claim.

15          The Court says: Well, hold on a second. Some of these  
16 people made 13 phone calls to the mortgager -- mortgage  
17 company, and in the first 12 times they were told it was going  
18 to be recorded but they forgot to tell them on the 13th time or  
19 some of these people have worked at call centers or some of  
20 these people -- and there is evidence in the case, like I'm  
21 showing right now on the screen, where individual Plaintiffs  
22 had different levels of understanding based on the surrounding  
23 circumstances.

24          And the Court said: When it comes to the expectation of  
25 privacy and when it comes to the severity of the intrusion, the

1 surrounding circumstances are not just important, they are  
2 critical. They are really what tells us the difference between  
3 you and me and anybody else and what we consider to be private.

4 And while some privacy cases can proceed as a --

5 **THE COURT:** So your -- your position is essentially  
6 the -- sort of the position that you say California Benchbook  
7 says. You are effectively telling me you can't certify a  
8 privacy case.

9 **MR. SANTACANA:** You know, I wouldn't go that far.  
10 What I can tell you is that the Plaintiffs --

11 **THE COURT:** What could you?

12 **MR. SANTACANA:** Well, I haven't seen one, Your Honor.

13 **THE COURT:** Okay.

14 **MR. SANTACANA:** There isn't one cited in the briefs  
15 where the invasion of privacy tort is certified for damages  
16 classwide. Not one. Okay.

17 Last night the Plaintiffs sent me a case they said they  
18 were going to mention today. That one doesn't work either.  
19 I'm happy to talk about it, but I don't know if they are going  
20 to bring it up, relating to the *Theranos* case.

21 But, you know, we hit them pretty hard in the briefs for  
22 not citing one; and they still didn't cite one in their reply.  
23 There isn't a case that has presented it quite right, and the  
24 closest it ever came is Judge Tigar in *Opperman versus Path*  
25 where he says: We don't have predominance here on -- in that

1 case it is about harm, which is one of our arguments which I  
2 will go to next. He says (as read:) "We don't have  
3 predominance here on that measurement of classwide harm, but I  
4 have carefully constructed subclasses and only certified the  
5 one where we all agree everyone was harmed. And for that  
6 subclass on this one app on this one type of data, we can do a  
7 nominal damages class."

8 That is as far as this Court has ever gotten, as close as  
9 it has ever gotten to certifying on this claim.

10 So that would be my answer, Your Honor.

11 **THE COURT:** All right.

12 **MR. SANTACANA:** I'm sure it is possible but it would  
13 have to be the right kind of case. And California law says  
14 that the reason for that is because invasion of privacy is a  
15 personal harm. It's about really what happened to you. It is  
16 about mental anguish.

17 And the Plaintiffs damages don't try to measure that but  
18 that is really what it's -- what it's for. And the CDAFA claim  
19 is not about mental anguish. It is about damage or loss, and  
20 the Plaintiffs aren't seeking compensatory damages either.  
21 They are seeking restitution on one hand or disgorgement on the  
22 other.

23 There is a total mismatch. And it may be that they wish  
24 they had some of the other claims still but they don't. These  
25 are the two that are here.

On implied consent there is also this other problem, which is that you can have implied consent from the conduct of a user.

And in this class as they have defined it, we have millions of people who -- you have probably seen this if you have an iPhone -- where they have been prompted. Would you like this app to be able to track you? And that's for conversion tracking purposes. And since April 2021, all apps on iPhone had to do that and all apps on iPad.

So, we have people in this class who said: "Yes, it's okay with me. They are allowed to track me." And even still these Plaintiffs would compensate them on the grounds of either disgorgement of profit or on restitution.

So, again, if we had that person in the chair at the trial in front of a jury of the fact-finder, we could say: "Really, you pressed yes on that? You agreed to this. You agreed to this. You agreed to this. But seven years ago when you created an account while you were doing ten different things and you clicked the button over and over again so you could get to the end of it, that's what overrides everything you have done for the last seven years."

That's an argument we want to make but it is an argument we can't make classwide.

(Pause in proceedings.)

**MR. SANTACANA:** One last point on this, Your Honor, is

1 what I have on the screen. The four Plaintiffs had different  
2 understandings. Three of them had a similar understanding. No  
3 means no. Zero data, period.

4 But this one at the time that he was sitting for his  
5 deposition believed that Google was personalizing advertising  
6 with WAA off data.

7 And when I questioned him, what he said was he had the ads  
8 personalization button on and the WAA button off. And I said:  
9 "I don't understand. Do you want ads or don't you want ads?"

10 And he said: "Yeah, I want personalized ads. They are  
11 really helpful. I just don't want them to be informed by the  
12 WAA off data. So I turned WAA off when I search certain  
13 things, and then I" -- okay, fine. That's exactly how the  
14 button works. He understood perfectly how the button works and  
15 the other three did not or at least said they did not.

16 So, again, this is an individualized issue. If he were  
17 sitting here at trial before the fact-finder, he would have to  
18 admit that the way that the button works is also what he  
19 expected.

20 By the way, I know your tentative thoughts on the Daubert  
21 and I would like to discuss them when the time comes; but the  
22 premise of the damages figures in this case that the Plaintiffs  
23 have put forward is in part that Google shouldn't even be able  
24 to keep the receipt for serving the ad. Okay.

25 Their client under oath said: "No. I want to see the ads

1 from Google."

2 Those two things cannot both be true. And if I could  
3 question each class member, all hundred million of them, maybe  
4 they would fall into buckets; but we don't know which buckets  
5 they are in right now. We can't know that in advance.

6 And if I could show them the Lyft privacy policy and I  
7 could -- so that's the argument, Your Honor. I'm happy to move  
8 on or --

9 **THE COURT:** You have to swim up against the current  
10 that says the damages aspect is generally not the reason to  
11 refuse to certify that -- although I acknowledge that there may  
12 be -- and I take your argument to effectively be more of a  
13 manageability argument that it can't -- there is no effective  
14 way to ever get to damages and, therefore, it can be something  
15 we address at class certification -- but generally, damages --  
16 problems with proving up the damages is -- even if there is  
17 some individual issues and you have to figure out do you do a  
18 claims proceeding or some other mechanism, it is usually not  
19 the basis under which you say you can't certify this class;  
20 right.

21 **MR. SANTACANA:** That is correct.

22 **THE COURT:** So is your argument that this is -- while  
23 acknowledging that, problems with the damage analysis is not  
24 going to be the basis not to certify.

25 You are saying this is just so unmanageable from the

1 damages perspective that I should take it into account at  
2 certification?

3 **MR. SANTACANA:** No, Your Honor. I want to be clear.

4 **THE COURT:** Okay.

5 **MR. SANTACANA:** The argument I was just making was  
6 about consent.

7 **THE COURT:** Oh, all right.

8 **MR. SANTACANA:** Implied consent by conduct. If I had  
9 Sal Cataldo in the chair before the fact-finder, he understood  
10 the button just fine.

11 **THE COURT:** I thought you were making an argument that  
12 somehow there was going to be so much difficulty in determining  
13 how any individual putative class member was harmed and what  
14 recovery they could have that that hurt certification.

15 **MR. SANTACANA:** No, that's not the argument I was just  
16 making, and I will address your point in a moment; but just to  
17 be really clear, my argument was: I can't tell the Sals from  
18 the Sams in the class. I don't know who is who.

19 But some of them got it just fine and others clicked yes  
20 on the Apple prompt and others -- Google Android has a button  
21 for zeroing out the conversion tracking ID. It has a button.

22 There's people in this class who pressed the button who  
23 would still be counted in the class. That makes no sense.

24 There is a button for the thing they say WAA was supposed to be  
25 for. And so by conduct those people clearly understood or they

1 wouldn't have pressed it.

2 In any case to address the question you just asked, I  
3 would recommend to the Court the *Bowerman* decision in the Ninth  
4 Circuit and the *Castillo* decision in the Ninth Circuit.

5 There is a difference between predominance problems based  
6 on individual awards and a problem with measuring damages fully  
7 classwide.

8 What is the classwide damage? Sometimes the model that's  
9 presented can't even do that, and that's what happened in those  
10 cases and the Ninth Circuit acknowledged the rule.

11           **THE COURT:** Doesn't that -- that then dovetails into  
12 your Daubert argument.

13           **MR. SANTACANA:** It does dovetail. But it is primarily  
14 in the Ninth Circuit *Bowerman* and *Castillo* cases, those are  
15 predominance is what they are saying.

16 I don't think we have to win the Daubert argument for that  
17 to make sense, right, just to address the legal doctrine that  
18 you were intoning.

19 So, I think that the next place I would like to go,  
20 Your Honor, is to talk about the harm arguments and  
21 predominance in our briefs.

22           **THE COURT:** Go ahead.

23           **MR. SANTACANA:** So, again, focusing on the claims that  
24 are at issue which doesn't include contract or wire tap act or  
25 any of that, both claims require a showing of damage or loss

1 for CDAFA or harm for invasion of privacy.

2 In looking at the case law, on what is and is not private  
3 and what is and is not harm and what does and does not rise to  
4 the level, the dozens of court cases we cite come out in all  
5 different kinds of ways depending on the precise nature of data  
6 at issue.

7 And here, the Plaintiffs are accusing a range of conduct.  
8 They are saying some people, there's a receipt that an ad was  
9 served to an alphanumeric string that means nothing to anyone.  
10 I think under Northern District law that is not an actionable  
11 claim. It's just not.

12 And Your Honor has held as such in *Katz-Lacabe*.

13 **THE COURT:** We don't have any Northern District law  
14 but okay. We have Ninth Circuit law that the Northern District  
15 tries to follow.

16 **MR. SANTACANA:** Sure.

17 **THE COURT:** But there's --

18 **MR. SANTACANA:** Well, in the Ninth Circuit -- if we  
19 want to talk about the Ninth Circuit, there is a distinction,  
20 for example, between Facebook internet tracking where the  
21 allegation is profiles that are tied to a person and URLs that  
22 reveal search terms and IP addresses, which in the Ninth  
23 Circuit do not have -- there's no expectation of privacy in the  
24 IP address because it is just how the internet works, right.

25 So here we have another just how the internet works claim.

1 There is a receipt.

2           **THE COURT:** Isn't this kind of, though, a retooled  
3 standing argument you are making to me?

4           **MR. SANTACANA:** No. Because these Plaintiffs can  
5 establish what I would say is Article III injury without  
6 meeting the element of the claim required for the tort or for  
7 CDAFA.

8           And there are plenty of cases that hold as much, right,  
9 where the Court isn't dismissing on standing grounds. It's  
10 saying -- I think it's the -- so *Hammerling* is an example and  
11 *Heeger* is another example where the Court says it looks like --  
12 you know, it could be private under certain circumstances but  
13 it is not highly offensive, so you have no invasion of privacy  
14 claim.

15           So on the screen now is one of the three types of conduct  
16 that Plaintiffs have grouped together which is the serving of  
17 ads.

18           So a user who is identified as pseudonymous 723 uses the  
19 Nike app. The Nike app serves New York Times ad. It is  
20 recorded on a piece of paper somewhere, digital piece of paper,  
21 this pseudo ID and this ad ID. It's a receipt. Nothing more.

22           They are saying that conduct is equally injurious to the  
23 next one which is then at time 2:00, the user installs the New  
24 York Times app. They saw the ad. They clicked on it and they  
25 installed it. The ad worked.

1       So now there is a third piece of information. You  
2 installed it. But by "you," we still just mean  
3 pseudonymous 723. Nobody has any idea who that is. There is  
4 no evidence in this case that Google has ever made any effort  
5 to figure out who that is.

6       So those are the -- two of the three in the range of  
7 conduct. And then the third I am a little unclear on from the  
8 briefing; but every time Plaintiffs talk about sensitive  
9 information, political leanings, sexual orientation, this is --  
10 this third bucket is what they are talking about, Google  
11 Analytics customer data.

12       And I have here these two red bars. On the right we have  
13 the WAA off world where information is kept separate and apart  
14 from information that could identify a person.

15       Now, Plaintiffs' expert says maybe they could reidentify  
16 if they change their code. They are not saying that we  
17 actually reidentify it.

18       And all of that sensitive information that they talk about  
19 in their briefs, that's in the green box associated with  
20 pseudo 723.

21       So they are saying this one where they are -- they argue  
22 there is political leanings, and this one which is just a  
23 receipt for advertising, those are both in the class. And the  
24 question of whether that's harmful predominates.

25       I would submit to Your Honor that there's no question that

1 this is not actionable right here on the screen. Can't be  
2 highly offensive. Can't be -- can't cause damage or loss.  
3 What interest does anyone have in this from a privacy  
4 perspective? It's a receipt.

5 Here is where they like to talk about: Well, you are  
6 going to know who I'm dating or you are going to know my health  
7 conditions. So now we have a predominance problem.

8 Are you using the health app or are you just using the New  
9 York Times or the NPR app or are you shopping on the Nike app?

10 There are cases in this district that are about a single  
11 app or a single website. And even there, like in *Opperman*  
12 *versus Path*, the Court says even on the single one it is too  
13 variable within one app what the data is.

14 We are dealing with one-and-a-half million apps of all  
15 kinds that do all kinds of things, and we have a right with the  
16 fact-finder to say: Okay, fine. Even if we lose on the health  
17 app and even if we lose on this particular part of the health  
18 app, do we really lose on the Nike app? The receipt of an ad  
19 shown in the Nike app for the New York Times is an invasion of  
20 privacy regardless of what WAA says; really?

21 That's an argument we can't make with all of this grouped  
22 together. It's an argument that Judge Tigar believed couldn't  
23 be made in *Opperman versus Path*.

24 It is an argument that he also believed couldn't be made  
25 in the *Hart versus Weather Channel* case where the Weather

1 Channel was accused of using location data.

2 And it's an argument that -- it's an argument that has  
3 led -- at the pleading stage has led courts to say some of this  
4 rises to the level and some of this doesn't.

5 To group it all together is to deprive us of the  
6 opportunity to sort those out.

7 (Pause in proceedings.)

8 **MR. SANTACANA:** The Plaintiffs' response on the  
9 argument that I just made in their reply brief is that -- well,  
10 first, their response is the *Kight* and *Hataishi* cases are no  
11 good because they are about CIPA Section 632.

12 The California Supreme Court in *Hernandez versus Hillside*  
13 has said for expectation of privacy the elements are the same.  
14 It's not -- they are comparable in that respect.

15 They say *Opperman* supports them. On that ground they say  
16 it supports them because Judge Tigar did certify a nominal  
17 damages class.

18 I recommend the case to Your Honor if you haven't read it  
19 already. I think he analyzed the issues very carefully and  
20 concluded on that one app, which was one type of data, the  
21 person's contact book.

22 There were lots of people who weren't harmed. There were  
23 some people he thought were harmed. He didn't certify as to  
24 the unharmed. He wouldn't even certify damages for the ones  
25 everyone acknowledged were harmed and even when they proposed

1 doing a survey to measure the damages classwide.

2       And after all of that, that's when he says so because it's  
3 that hard, maybe we will do nominal damages for one app for  
4 contact books.

5       Here they are saying there is all of this mix of  
6 information coming from all of these different apps. They are  
7 not telling you exactly what it is. They don't display  
8 anywhere what the sensitivity is. So I think that -- that case  
9 really is a guidepost.

10      Okay. So the last piece on harm, I would say, Your Honor,  
11 is that we deposed the Plaintiffs. There used to be a lot more  
12 of them actually. We deposed a lot of Plaintiffs. There's  
13 four remaining now.

14      And each one of them was pretty clear about just how  
15 insubstantial Google's conduct was to them. Even when they  
16 believe they were receiving personalized ads with WAA off data,  
17 each one of them says: "I don't like it. It is creepy to me  
18 but I still use all the apps. I'm not going to change my  
19 fantasy football app because my friends, that's the one they  
20 use."

21      They are saying essentially "here is the cost benefit I  
22 have come to on this question."

23      Well, we should be able to do that with each Plaintiff.  
24 These are substantial defenses that may even rise to the level  
25 of summary judgment, but only because we got to depose them,

1 right -- only because we got to depose them.

2 Now, if the Plaintiffs will stipulate that testimony is  
3 typical of everyone, then that means everybody in the class  
4 would say the same thing; and I'm not sure why we are here.

5 What they are saying is there were people in the class who  
6 were really hurt, and we have Plaintiffs who really effectively  
7 were not apart from the creepiness factor which enters into  
8 Article III but doesn't enter into either one of their damages  
9 model at all. Their damages models are measuring economic  
10 damages.

11 So because class members had these vastly different  
12 experiences, they saw different disclosures, because their data  
13 was captured in vastly different ways, we believe we have a  
14 right to assert our viable defenses just as we do as to these  
15 four Plaintiffs as against the rest of the class. We can't do  
16 that fairly at a class trial.

17 Now, there are some defenses that may be decided  
18 classwide, but we have a right to present all of our defenses  
19 and class treatment will deprive us from being able to do that.

20 I would like to address the Daubert briefly, Your Honor.

21 **THE COURT:** Why don't -- I will let you do it, but  
22 let's have the other side talk about certification issues, and  
23 then I will let you get back up and talk about Daubert.

24 **MR. SANTACANA:** Sounds good.

25 **THE COURT:** Okay.

**MR. MAO:** Sorry, Your Honor, we do have -- I apologize. We have slides and we have paper copies. May we approach the bench, Your Honor?

**THE COURT:** Yep.

(Pause in proceedings.)

**MR. MAO:** Yeah, Your Honor, just quickly on the roles, Mr. Sila will address the Daubert. It is his -- it is his first merits argument.

**THE COURT:** Great.

**MR. MAO:** So Mr. Lee may back him up to the extent that you allow it.

**THE COURT:** Okay.

**MR. MAO:** Yep, thank you, Your Honor.

So with our presentation, what I want to start off by is really just overall arching framing, Your Honor, which is that Mr. Santacana, you know, who stated that privacy cases don't get certified, I'm sure, Your Honor, you remember the TCPA cases, FCRA cases, and then recently the Biometric Information Protection Act [sic] cases, all of those cases receive certification as early as the 1990s. So even the *Transunion* versus --

**THE COURT:** But they probably wouldn't characterize those as privacy cases, would they?

**MR. MAO:** The TCPA cases or the FCRA cases?

**THE COURT:** Any of those cases. I mean, in the sense

1 of the claims you are bringing here.

2 The bottom line is there -- they have said that no one has  
3 certified in the context of the claims that you are bringing.

4 Now, are they right or wrong?

5 **MR. MAO:** They are wrong. We cited four cases.

6 **THE COURT:** Four?

7 **MR. MAO:** We did. We cited *Williams v. Apple*, which  
8 is Judge Koh's case in our reply brief. We cited *Romero versus  
9 Securus* in our opening brief. There was also -- sorry, I'm  
10 blanking out. There is --

11 **THE COURT:** Well, they have acknowledged that Judge  
12 Tigar certified and they talked about why that -- I shouldn't  
13 view that as one in your favor, so --

14 **MR. MAO:** Well, my point is actually this, Your Honor,  
15 like the *Transunion versus Ramirez* case in which they cite in  
16 support of their position is a FCRA case that was certified  
17 that went all the way up to the Supreme Court. And FCRA cases  
18 have been certified for decades and that is a privacy case  
19 because it is about the wrongful disclosure of information.

20 So there absolutely is precedence in essence of the newer  
21 industries have come through, and there is different  
22 technologies and different statutes.

23 The credit bureau industry is much older, right, than the  
24 new online search and data broker industries. Of course it is  
25 going to take time. That's why you are seeing the FCRA cases

1 getting certified as biometric information comes along.

2       But my point on that is actually this: There is one  
3 glaring thing you did not hear from the other side which is  
4 regarding CDAFA.

5       We said this in the opening. We said this in the reply.  
6 And Your Honor actually mentioned this in the motion to  
7 dismiss, which is that CDAFA requires that the Defendant has  
8 obtained permission. There's two elements there. There is the  
9 permission and there is the obtaining.

10       And when you look at the architecture -- even Google's own  
11 technical architecture -- it absolutely treats these signals as  
12 unpermitted. The actual bits, right, in which, you know, may  
13 have been subject to a slight sealing issue so I can't mention  
14 the name; but if you look at the presentation, the one that is  
15 unredacted in front of you, Your Honor, page 13, Google's own  
16 bits call these things private.

17       In other words, the bits associated with the data that's  
18 being logged, they are called private bits; and they are also  
19 characterized as unconsented within the technical architecture  
20 itself.

21       Why is that important? Because under the CDAFA statute,  
22 under 502(c)(2), which is what we have sued on, in order for  
23 Google to actually be able to record this when they know they  
24 have obtained not actually a permitted signal -- they received  
25 an unpermitted signal -- they can't circumvent the permissions,

1       in fact, when it is the very button in which they proffer;  
2       right.

3           And they are talking about how the button -- an on/off  
4       button -- is ambiguous. Your Honor, if you said a light  
5       switch -- everybody should turn off the lights in this  
6       courtroom, I don't think that would be unambiguous -- I don't  
7       think that would be ambiguous. It is either on or it's off,  
8       and you would expect everybody to understand, have a reasonable  
9       interpretation of what that means.

10          And actually, Defendant's own opposition, the presentation  
11       which they gave you, actually tells you exactly what Your Honor  
12       had explained. The question at issue in front of us is whether  
13       or not this can be resolved on a common base, on a classwide  
14       basis.

15          Their own demonstration, they can't help but resist coming  
16       up here and talking about this as if this were a contract  
17       dispute.

18          In fact, in the *Williams versus Apple* case, that's exactly  
19       how Judge Koh certified the (b) (3) class. It is precisely  
20       because she viewed the whole contractual exercise -- in other  
21       words, the disclosure exercise in which the court is given --  
22       as an objective one.

23          And Google actually agreed just now and in their briefs.  
24       When you read their briefs, they can't resist talking about the  
25       contractual principles because they know that is something that

1 can be resolved on a classwide basis.

2           **THE COURT:** Can you address the arguments with respect  
3 to the third parties in the consent issue with respect to all  
4 of the NPRs of the world as they presented it. Doesn't that  
5 present a big problem for you?

6           **MR. MAO:** It does not, Your Honor. And this is  
7 something that you, yourself, had noted also in the motion to  
8 dismiss orders, right, which is that these disclosures -- and  
9 this is also something which Judge YGR had mentioned and I will  
10 address that quickly.

11           **THE COURT:** What?

12           **MR. MAO:** That she had mentioned this in *Brown* so --

13           **THE COURT:** Gonzalez Rogers?

14           **MR. MAO:** Yes, Gonzalez Rogers. And she has said: In  
15 order for consent to be actual, the disclosures must explicitly  
16 notify users of the practice at issue.

17           Okay. And here, you have seen nothing in the briefs.

18           **THE COURT:** She refused to certify, though, didn't  
19 she?

20           **MR. MAO:** Well, there is a dissolution of factors. In  
21 that case you had actual articles in which Google cited to  
22 too -- and we dispute. There is a factual dispute on that --  
23 and we may seek recertification on that; okay.

24           But the issue there is Google pointed to two articles in  
25 which they claim disclosed the tracking at issue. Here you see

1 nothing in the opposition. You have seen nothing proffered  
2 just now.

3 In fact, to the contrary, you have seen Plaintiffs present  
4 Google's own demonstrations that their CEO -- taking the same  
5 interpretation which the Plaintiffs had; their own employees  
6 taking the same interpretation -- and they're conducting  
7 studies which show that people unanimously believed that it was  
8 not going to be saved.

9 And then when they are talking about these two cases --  
10 *Hataishi* and *Kight* -- those cases, when you read the cases --  
11 and Mr. Santacana actually just explained it. He said that the  
12 reason why *Hataishi* did not get certified was because the class  
13 was dealing with people who had received disclosures when they  
14 called in versus people who did not receive disclosures, and  
15 sometimes people received disclosures in inbound calls as  
16 opposed to the outbound calls. And, therefore, that created  
17 inconsistencies.

18 Here, neither in the opposition nor in the presentation,  
19 even after they received our second challenge on the reply for  
20 them to proffer actual evidence of notification, they did not  
21 present you any third-party privacy policies which says and "we  
22 or Google," neither, okay, "will not respect the privacy signal  
23 that Google is collecting," consented or unconsented. It is on  
24 or it is off.

25 That is exactly how Mr. Rimler (phonetic) interpreted what

1 an on/off button means. It is either collected or it is not.

2 Two other things, Your Honor, we also noted in the briefs  
3 which they have not responded. First of all, Google themselves  
4 in their privacy policy committed to explicit consent; right.  
5 We noted that in the reply, and Mr. Santacana has not addressed  
6 that.

7 Explicit consent means notifying exactly what is being  
8 done. And Mr. Santacana when he came up here, he, himself,  
9 conceded maybe, maybe the language is ambiguous, Your Honor;  
10 but nonetheless, he is going on and talking about  
11 individualized issues.

12 If that is true, Your Honor, how can that be explicit  
13 consent in which they, themselves, have conceded to is through  
14 a contractual requirement. You are getting up and talking  
15 about the contract while saying that this is really a privacy  
16 claim. You can't have your cake and eat it too.

17 And here is the second thing, Your Honor, you have not  
18 heard a single statement -- a single statement from the other  
19 side saying how would Google actually turn off the saving.

20 In order for you to have consent -- even implied consent,  
21 as the Judge said in *Brown*, the consent must be actual -- how  
22 can you have consent if you are not presented a choice of on  
23 and off?

24 So Google on the one hand wants to tell you they have  
25 consent because they offered a choice. On the other hand, they

1 want to tell you the choice is not real. That's okay because  
2 they gave consent. That's a circular argument, Your Honor.  
3 And that absolutely makes no sense.

4 And you have not heard any answer on the other side how  
5 that is true. It is not provided in any third-party  
6 disclosure. They pointed to none.

7 Please, examine the record. Examine the disclosures in  
8 which they put in their presentation. Not a single ones says:  
9 When (s)WAA is off, we are still going to collect your  
10 information anyways or when (s)WAA is off, Google is still  
11 going to collect your information.

12 Instead, they are arguing over what people could have  
13 speculated or could have potentially done or thought; but,  
14 Your Honor, first of all, that is not the element under CDAFA.

15 CDAFA is as soon as you received an unpermitted signal,  
16 you need a permitted signal in order for you to collect. They  
17 have not addressed that; okay.

18 Secondly, their own architecture says that that is  
19 unconsented that goes to all of the elements, all of the  
20 elements; and they have given you a rebuttal as to how that is  
21 actually overridden.

22 Insofar as they disagree, Your Honor, that is still -- as  
23 you said, that is a common issue to be resolved classwide.

24 I want to just talk real quickly, Your Honor, if you look  
25 at my presentation, we gave you very, very clear framing. And

1 I will start with page 4 so that we can, perhaps, just move  
2 through this much quicker.

3 Since the beginning of the case, Your Honor -- and they  
4 keep saying that we have changed our case theory. In fact, we  
5 have not because you can see, they also agreed to the same  
6 framing since the beginning of the case.

7 This is a February 12th, 2021 letter from Google -- and  
8 there's actually more letters like this. We cover this at  
9 page 9 of our opposition -- Google itself agrees that this case  
10 is a perfect case for class certification.

11 The two questions are: What does Google say publicly and  
12 what do its products do. And you have heard nothing up here  
13 regarding how there's any variance regarding what Google says  
14 and then secondly what Google's products do. Okay.

15 Let's first start with what Google's products -- sorry,  
16 what Google actually says. And this is on page 5, the next  
17 page. You have not heard any disagreement, Your Honor, that  
18 these are the relevant screens and representations -- as you,  
19 Your Honor, pointed out in the motion to dismiss; right --  
20 choose the activities that allow Google to save. This is the  
21 only Android screen and other two are on the IOS screens; okay.

22 On the Android screen it says: Choose the activities that  
23 you allow to save under the privacy settings which is the  
24 device setting. And by the way, this is a Samsung phone,  
25 Samsung Android phone.

1       And the third screen -- this is exactly what Your Honor  
2 had pointed out in the motion to dismiss -- to let Google save  
3 this information web and app activity must be turned on.

4       Now, they take variance with this language. But, Your  
5 Honor, what we have not heard is how is that an individualized  
6 issue as opposed to something that can be resolved on a  
7 classwide basis? Nothing from the other side.

8       Well, let's just take that issue for a moment. Let's  
9 suspend our disbelief and just say: What do these disclosures  
10 really say? How do people interpret them?

11       Google's own employees on page 6 and page 7, multiple  
12 employees throughout different times throughout the class  
13 period, they all believe that WAA is an on-and-off signal.  
14 It's binary. Just like when Your Honor says "turn off the  
15 lights," you expect everybody here to understand what that  
16 binary signal actually means. Off means off. Don't collect  
17 means don't collect. Private means private.

18       Critically, we also twice challenged how Mr. Sundar  
19 Pichai, Google's head of state, he, himself, interpreted these  
20 controls to be collecting while Google -- whether or not Google  
21 collects information on you and what we have on you.

22       In other words, exactly the way Defendants -- okay, is  
23 contrary to the way in which Defendants have actually  
24 represented that people should understand this.

25       You want more? Page 10 of our slide -- so I skipped over

1 another slide and almost done, Your Honor, okay -- two months  
2 before we filed a lawsuit, Google conducted a study; and their  
3 own study says all participants expect when turning WAA toggle  
4 off to stop saving their activity; okay. No ambiguity. No  
5 variance, and you have heard nothing from the other side to the  
6 contrary.

7 Now, I just want to address briefly their second  
8 element --

9 **THE COURT:** Why don't you address for me the harm  
10 issue that Mr. Santacana spent some time on? You know, the  
11 notion that some of the putative class members even confronted  
12 with learning of these -- of the way this all operates says:  
13 "I don't care." I -- you know, "I'm going to keep using it,  
14 you know, okay, I have been mistreated. This outweighs it. I  
15 want to keep using."

16 Other class members say: "Oh, this is a terrible invasion  
17 of my privacy and I'm emotionally distraught."

18 What do you do with that?

19 **MR. MAO:** So, Your Honor, that's not what they said;  
20 but I will address, first, the actual and I will address the  
21 hypothetical just to entertain the hypothetical; okay.

22 First of all, on the actual, I don't understand what ad  
23 personalization has to do with whether or not Google saves  
24 data.

25 **THE COURT:** That Google did what?

1           **MR. MAO:** Whether or not Google saves data from  
2 third-party sites.

3           **THE COURT:** If putative class members have very  
4 disparate views on whether or not that practice makes any  
5 difference at all to them is -- is potentially a question for  
6 purposes of analyzing certification.

7           You are saying: Listen, if they have engaged in conduct  
8 that results in taking this information when they shouldn't,  
9 then why does it matter?

10          Well, that may be a basis for an individual claim against  
11 Google, but why then is it not a problem for you when you are  
12 trying to put them all together on a certification basis if  
13 there are very disparate views among putative class members  
14 about whether or not they were harmed in the first place?

15          **MR. MAO:** So that's why I take issue with the fact  
16 that that's not what they said. We need to review the record  
17 very carefully; okay. Again, going back to the analogy --

18          **THE COURT:** I don't really -- maybe it's  
19 mischaracterizing what they said. That is my question: So  
20 whether or not they said it, why is that not a problem for you?

21          **MR. MAO:** First of all, right, the truth held in the  
22 Ninth Circuit is it is their burden, right, to show that there  
23 are individualized issues. This is a hypothetical in which --

24          **THE COURT:** But your initial burden is to establish  
25 predominance amongst other things, all the other 23(a) factors.

1 And this is a question of whether or not if everybody has  
2 different views on whether or not they have been harmed, isn't  
3 that a predominance problem?

4 **MR. MAO:** No, Your Honor.

5 **THE COURT:** That --

6 **MR. MAO:** Because the harm --

7 **THE COURT:** You are entitled to your opinion but I  
8 want to know why.

9 **MR. MAO:** Sure. The harm here has been calculated in  
10 accordance to -- what they are talking about is emotional  
11 distress damages; okay. That is one type of --

12 **THE COURT:** They are -- okay. Go ahead.

13 **MR. MAO:** I disagree, Your Honor, because if you look  
14 at the way it's been briefed, right, we talked about four  
15 different categories of damages, none of which are emotional  
16 distress damages.

17 And this is something which I will leave for Mr. Sila  
18 because that's part of the Daubert. Maybe you want me to  
19 address that right now, which is totally fine.

20 Your Honor, we talked about unjust enrichment. We talked  
21 about actual damages and restitution based upon the market data  
22 which Google itself defined and paid. Then we talked about  
23 punitives and then we talked about nominal.

24 For nominal and for punitives, I don't believe that any of  
25 the questions in which we are asking about regarding how much

1 individuals value privacy impacts either of those, neither does  
2 disgorgement, Your Honor, okay, because disgorgement is about  
3 the Defendant and it is not about the Plaintiff.

4 So Your Honor's questions is actually about the  
5 Plaintiffs, which is in the bucket of restitution, putting the  
6 Plaintiff back to the place in which they used to be.

7 And on that, Your Honor -- unless I'm wrong -- I believe  
8 that our model is based upon the very same payment -- albeit a  
9 conservative payment -- that is paid by Google.

10 **THE COURT:** Your punitive damage argument, I get you.  
11 Plainly that wouldn't be dependent upon individualized  
12 valuation of privacy, but I'm not sure that your other damages  
13 theory why it is utterly irrelevant -- I mean, in assessing  
14 whether or not there is any value here, isn't it relevant at  
15 all whether or not Plaintiffs think there is anything to this?

16 **MR. MAO:** Yeah, but, Your Honor, that is within the  
17 class; right. They all turn off the button to not be saved and  
18 Google has not shown any variance that when people set off, it  
19 actually means something else.

20 The analogy they use -- again, as Your Honor conceded --

21 **THE COURT:** It does turn on your Daubert -- your  
22 expert's -- your expert is saying they have to disgorge their  
23 ill-gotten gains; right?

24 **MR. MAO:** But that is how much money they made. It is  
25 not how much the money -- the data is worth for the

1 individuals.

2           **THE COURT:** You went through the damages model. What  
3 I'm trying to get at is that what you are really suggesting to  
4 me, if I'm hearing you correctly, is that the reason that  
5 individual putative class members' perceptions of the  
6 importance of privacy to them is -- you are effectively saying  
7 that is irrelevant for certification purposes; right?

8           **MR. MAO:** No. I'm saying that it's established by a  
9 common record across an entire class as established by Google's  
10 own evidence, Your Honor.

11           That -- out of the four buckets, the one that we are  
12 talking about, the restitution, that's based upon Google's own  
13 payments for that data.

14           **THE COURT:** That's not what I'm asking. You are --  
15 what I'm trying to get you to address for me is -- because I'm  
16 trying to understand how you think recovery seems to be  
17 disengaged from the perception of the Plaintiffs about whether  
18 or not they were harmed.

19           And is that what you are saying? It did not matter  
20 whether or not any Plaintiff -- all of them, none of them, half  
21 of them -- think they have been harmed at all by this. It  
22 doesn't matter; is that right?

23           **MR. MAO:** Let me -- I will answer that question but  
24 like, Your Honor, we are talking as if there is an established  
25 record that any of the Plaintiffs don't think that they have

1 been harmed. They are talking about ad personalization as that  
2 one example. Here we are talking about whether data is saved.  
3 That's like saying --

4           **THE COURT:** Whether data is saved -- wait, wait.

5 Whether data is saved in the abstract, you -- that doesn't  
6 automatically mean -- of course, that means there has been  
7 ill-gotten gains that must be disgorged.

8 You are almost saying all you have to answer -- the only  
9 answer -- the only thing we need to determine here is whether  
10 or not there -- information was saved. Once we determine that,  
11 end of case?

12           **MR. MAO:** For CDAFA certainly, Your Honor. Those are  
13 the elements of CDAFA.

14 Now, the questions you are asking --

15           **THE COURT:** Doesn't it have to be highly offensive?

16           **MR. MAO:** It does, right. But, Your Honor, this is  
17 why I was pointing out the bits that Google treats all the data  
18 uniformly. They are all flagged as unconsented with privacy  
19 bits across the entire class. We have not heard anything to  
20 the contrary. They treat the class commonly, typically and  
21 with predominance.

22           **THE COURT:** Okay. All right. I think we are a bit  
23 ships that are passing in the night but keep going.

24           **MR. MAO:** Setting that aside, Your Honor, the highly  
25 offensive determination as you have pointed out and Google

1 agrees is actually an objective standard.

2           **THE COURT:** Okay.

3           **MR. MAO:** Right. And my point is this: They are  
4 saying essentially the following with regard to contract and  
5 contract-like cases: It is possible that, you know, juries may  
6 look at an ambiguous statement and conclude different things or  
7 something like that.

8           That's not the way in which our system operates; right.

9 There are ambiguities and we resolve that on an objective basis  
10 based upon that of a reasonable person.

11           So here for the privacy torts, both sides agree and the  
12 opinions agree it's an objective standard.

13           So, again, Your Honor, while I appreciate your question,  
14 that's a merits argument in my view; okay.

15           And honestly, the way you have heard the other side both  
16 brief, argue and present, they are all merits based argument.  
17 Those are Rule 56 arguments they want to make based upon, by  
18 the way, Your Honor, hypotheticals which have not been  
19 presented with actual evidence which is actually their burden  
20 under *True Health* for the Ninth Circuit.

21           And they have not presented you a single shred. The best  
22 they can muster after spending 30 minutes up here was telling  
23 you something about a completely different setting, ad  
24 personalization. Where is the study correlating ad  
25 personalization with (s)WAA nothing? Right.

1 So --

2       **THE COURT:** You are right that if it was -- just  
3 technically a merits argument isn't the focus on class cert but  
4 merits do enter into the class certification analysis.

5       So it is not as easy as saying: "Oh, I'm going to label  
6 that a merits argument and, therefore, I need not -- "you need  
7 not be worried about that, Your Honor, in trying to assess  
8 class cert."

9       There are aspects of what I need to consider that are  
10 merit related in terms of the -- and this may be one of them.  
11 But, okay, I get it.

12       **MR. MAO:** So let me just deal with the merits; right.  
13 Again, Google can't have their -- they can't have their cake  
14 and eat it too.

15       On the one hand they want to treat this like this is a  
16 contract case. Not my words. Their words, their brief, you  
17 know, their examples, all contract based.

18       Their contract base says: We require express consent --  
19 your explicit consent, okay, to treat you differently. And  
20 then secondly, they present it as if they were presenting you  
21 an actual choice.

22       Even if there are some weird interpretations on contract,  
23 different people think differently, those two things are  
24 objective promises, Your Honor.

25       Is there an actual choice? They have not shown you a

1 single example where Google offers you some actual choice.  
2 They are, in fact, actually telling you "off" does not mean  
3 off. So my lights are staying on indefinitely. It is an empty  
4 light switch like I give to my two-year-old.

5 Secondly, where is the explicit consent? They point --  
6 they give you -- they spend -- I believe I counted. It was  
7 like seven pages -- examples from third-party disclosures none  
8 of which talk about WAA or (s)WAA or what Google is not doing  
9 when you are obeying their settling with regard to that.

10 So there is no evidence in front of you, Your Honor, and  
11 that was their burden to carry. We have already demonstrated  
12 not only according to Google's own framing, right, what are the  
13 disclosures and what do we actually do.

14 You are actually not hearing them dispute the disclosures  
15 in terms of what it says. They may have a different  
16 interpretation as to what that says -- I'm sorry -- what that  
17 means, but that's a common question; okay. No dispute there.

18 What does Google actually do? As we show, okay, on  
19 page 12 of our slides, Google arbitrarily chose for my account  
20 just one identifier.

21 All these Google identifiers are saving everything to,  
22 they are saying that when it's GAIA, that means that we are  
23 signed in and we have consented and when we were not consented,  
24 we are under an encrypted GAIA.

25 Nonetheless, I'm still going to save you according to your

1 Google assigned app ID -- and app instance ID technically --  
2 Google device ID, the Google Firebase ID. And there are no  
3 disclosures regarding how in the world any of this would not be  
4 associated with a Google account when they are Google  
5 identifiers.

6 They don't even dispute that, Your Honor, in their  
7 opposition. So it -- in a way if we are going to talk about  
8 expectations insofar as that may be dealing with consent, that  
9 has nothing to do with any of this because there is no actual  
10 choice, and there is no explicit notification of what they are  
11 actually doing. They have shown you zero evidence on that,  
12 Your Honor.

13 And, again, going back to your damages question, okay, if  
14 you look at our model, Your Honor, four buckets.

15 Nominal punitives, those, I believe, are actually, you  
16 know, within -- nominal, I think there is some debate on the  
17 law as to how that is determined. Punitives, I believe is  
18 particular under the CDAFA, that's within your discretion;  
19 okay. Unjust enrichment, that's about the Defendant, what the  
20 Defendant unjustly earned. Restitution, I think is, perhaps,  
21 your question. On that, we have used a very conservative model  
22 based upon Google own numbers.

23 If you have a question on that for Daubert, I would --

24 **THE COURT:** Let me first just kind of address your  
25 points and then we will go -- I will keep him up here. He can

1 talk about Daubert, and then I will let your colleagues  
2 respond.

3 **MR. MAO:** Okay. Sorry, Your Honor. I think I'm  
4 stepping off; right? Just making sure.

5 **THE COURT:** Okay. Mr. Santacana, you can respond to,  
6 briefly, the points that have been made, and then you can talk  
7 about Daubert.

8 **MR. SANTACANA:** Okay. It was a lot, Your Honor. I'm  
9 going to be as brief as I reasonably can.

10 **THE COURT:** Okay.

11 **MR. SANTACANA:** So I want to start by kind of trying  
12 to take a look at this case from a bird's eye view for a  
13 moment.

14 The Plaintiffs are saying there is a light switch, and  
15 there is a label on the light switch. When I turn it off, it  
16 should do the opposite of what the label says. So kitchen  
17 lights on, off. Okay, great.

18 But the way they've constructed this case is they are  
19 saying this light switch when I turn it off, the label  
20 shouldn't just say, "I'm turning the kitchen off." It should  
21 also say, "I'm leaving the living room on, and I'm leaving the  
22 bathroom on, and I'm leaving the neighbor's house on, and the  
23 power will still run to the house."

24 The kitchen lights are off. The switch does work but I'm  
25 not going to list out everything that it doesn't do.

1           **THE COURT:** Right. All of those things are -- can be  
2 answered on a classwide basis.

3           **MR. SANTACANA:** I don't agree, Your Honor. And that's  
4 where I think -- that's where I think Mr. Mao and I diverge is  
5 he says all of this is just contract; right. And Google says  
6 it's all contract. Contract principles --

7           **THE COURT:** Let me stop you a minute and tell you what  
8 troubles me about your argument and you can clear it up.

9           On the one hand in the very simplistic way, you are saying  
10 this is -- you know, this is just so obvious that Google's  
11 approach here is -- they have misinterpreted it. It's very  
12 clear, you know, end of story.

13           And then when it gets to the question of class  
14 certification, you say: Oh, well, it is not subject to some  
15 sort of clear yeah or nay we are doing something right.

16           It seems to be somewhat inconsistent in how you are  
17 arguing this to me. You know, no one could consider what we  
18 have done to be wrong. It's just so clear but it's so murky  
19 that we can't have class certification. So I don't -- I'm  
20 having trouble with that.

21           **MR. SANTACANA:** Yeah. So, here is, I guess, how I  
22 guess I square that circle because I do think there is sort of  
23 a mental hurdle there.

24           If the case were only about the Google terms of use and  
25 the WAA button's description, then I think you would be

1       absolutely right; and there are a lot of cases in the district  
2       where classes get certified because the only question is what  
3       does the contract mean.

4             **THE COURT:** And you are kind of saying, at the  
5       beginning of your presentation, how strong your argument is in  
6       that respect.

7             **MR. SANTACANA:** Well, what I said was it doesn't say  
8       I'm going to turn off the neighbors house. Mr. Mao says, "You  
9       never told me the neighbor's house was going to be on in the  
10      first place." They have to say that or they have a problem  
11      because what really happened is what I showed you on these  
12      slides in the peach colored slides is that Google says in a  
13      variety of places and then also app developers in the red  
14      slides say in a variety of places "neighbor's house is going to  
15      be on. We are going to keep records" -- if you look at  
16      slide -- just as one example, slide 14. (As read:) "We give  
17      advertisers data about their ads' performance but we do so  
18      without revealing any of your personal information."

19             Mr. Mao said Google has never disclosed that to anybody  
20      but there it is right there. Every single one of those pages  
21      is disclosing it over and over. Of course, that's how the  
22      internet works. We have to keep a receipt. We are not just  
23      serving ads and then not keeping a log of it.

24             So at a minimum there has to be a server log, which is the  
25      bottom one. We store a record of the ads we save. We

1 anonymize this log data. We anonymize this log data. It is  
2 undisputed that that's what Google did.

3 The question is: Does the kitchen light switch mean that  
4 all of this is overridden? That's the question. And to answer  
5 that question, we can't just look to the terms of use, and we  
6 can't just look to the WAA button.

7 One of the things I just read to you is from a supporting  
8 privacy policy page. There is also the privacy policy itself.  
9 There is also people's basic understanding of how the internet  
10 works like Mr. Cataldo.

11 There's also the third-party app disclosures which say,  
12 "I'm going to collect some basic anonymous information from you  
13 so I know how well my ads perform." And people repeatedly  
14 agree to that.

15 So, even if this were a contract class, I'm not sure it  
16 could be certified. Contract cases get certified when there's  
17 one contract.

18 Here, I think part of the problem is there are thousands  
19 of written instruments that people are clicking through and  
20 saying "this is fine with me," and then there is this one  
21 button that says "kitchen lights."

22 And their argument has to be -- in order to certify the  
23 class, their argument has to be "ignore everything around it.  
24 Ignore the neighbor's house. Ignore the living room. Just  
25 focus on the kitchen."

1       That's not reality. And that's why, Your Honor, again  
2 courts have repeatedly held that this isn't class cert material  
3 in very similar circumstances where a Defendant says, "Here's  
4 what I'm going to do" and then it says something else that  
5 causes someone to believe --

6           **THE COURT:** What is the clearest expression of these  
7 myriad of cases you are talking about? Which one -- if you  
8 could only pick one that I'm going to look at that is going to  
9 be compelling in terms of what you just said, which one should  
10 I look at? Judge Tigar's case in, is it, Oppenheimer or --

11           **MR. SANTACANA:** *Opperman versus Path.* No. *Opperman*  
12 is not a consent predominance issue.

13           **THE COURT:** Give me one. I'm only going to read one.  
14 Which one is it?

15           **MR. SANTACANA:** I think that if you are only going to  
16 read one --

17           **THE COURT:** I will give you two.

18           **MR. SANTACANA:** I have to give you two.

19           **THE COURT:** Go ahead. Give me two.

20           **MR. SANTACANA:** Okay. The *Google/Gmail* case because  
21 in it Judge Koh distinguishes the yeses and the nos. This is  
22 certifiable. This is not. So there is helpful analysis there.

23           **THE COURT:** Okay.

24           **MR. SANTACANA:** And then I think -- I think the *Hart*  
25 *versus* --

1           **THE COURT:** That's Judge Tigar.

2           **MR. SANTACANA:** *Hart versus Weather Channel* case,

3 there is actually a quote from it right here, Your Honor.

4           **THE COURT:** No. I will look -- I always love to read  
5 Judge Tigar's, they are always well done and very instructive.  
6 So I will take a look at it -- that case.

7           **MR. SANTACANA:** Okay. Well, in that case -- we  
8 haven't talked about it a lot -- in that case the issue was the  
9 Weather Channel did say -- and I just want to -- when we talk  
10 about what did they say, was it disclosed, what are the  
11 different disclosures? Again, a lot of their case none of  
12 those disclosures mention WAA so you can ignore them.

13           So on slide 17 -- this is straight from their reply  
14 brief -- their argument is everywhere where the kitchen light  
15 switch is, it must also list all the things that it isn't.

16           And their reply brief kind of with a straight face  
17 suggests, well, the third-party app disclosures don't say that  
18 Google won't honor its user privacy settings.

19           Even the cases that we have cited where implied consent  
20 precluded class certification, it doesn't have a disclosure  
21 like the one in red here. It says: And by the way, some other  
22 party is not going to honor their settings -- is not going to  
23 honor their promises. That's not what's required.

24           And in the privacy context what is required is a holistic  
25 evaluation of what that person knows and understands. It is an

1       objectionable -- objective expectation of privacy but based on the  
2       circumstances of the person.

3           So in *Hart versus Weather Channel* it is one website  
4       location data. In *Opperman v. Path* it is one app and its  
5       contacts books.

6           This is one-and-a-half million apps. This is both a  
7       receipt because I saw an ad for a sneaker, and it is other  
8       types of data relating to all of the sensitives they raise.

9           All right. The other point I want to make from what he  
10      said is that this question of highly offensive conduct, some  
11      judges have said it's a policy question and yet repeatedly they  
12      are denying class cert in part on that basis.

13           The problem is that this is not -- the policy decision  
14      about Google's conduct -- it's not just Google's conduct at  
15      issue; right. The apps are the ones who implement the  
16      technology in various ways.

17           And so in order for there to be a holding of highly  
18      offensiveness, you would have to look at the specific nature of  
19      the data at issue. And we cite in our briefs those cases which  
20      say that.

21           With that, I'm ready to turn to the Daubert.

22           **THE COURT:** Go ahead.

23           **MR. SANTACANA:** Okay. So, there's two damages models.  
24      I will start with sort of an overarching point with our problem  
25      with this expert report.

1       And the overarching point is that you can tell that these  
2 damages models are outcome determinative and unreliable because  
3 if you test them to see how malleable they are, the answer is  
4 always the same.

5       For the unjust enrichment model, what Lasinski did was he  
6 said every ad that was served to a person with WAA off, I want  
7 all of the money back, all of it.

8       So imagine for a moment, that Google accepted the data at  
9 issue on the servers. You heard Mr. Mao say the harm is that  
10 it was saved, just that it was saved, the app itself.

11       Okay. So Google saves it, locks it up, encrypts it, puts  
12 it in the woods and buries it. And he says, okay, I want the  
13 half billion dollars for that.

14       Or Google personalizes advertising. It reidentifies who  
15 people are. It figures out what their preferences are using  
16 the same exact data. It doesn't just say that it uses it and  
17 exploits it to that degree. And Lasinski says: "Yep, same  
18 number. I want the same number."

19       It does not matter what Google does with it. It doesn't  
20 matter whether Google profits from it at all. If ads were  
21 shown, then he wants the money back. It is a one hundred  
22 percent non-restitutionary disgorgement opinion.

23       So I'm not saying -- I understand that some things go to  
24 the weight, but the Supreme Court has new rules on this coming  
25 out December 1st that emphasize that judges too often say it

1 goes to the weight and too often allow things that are so --  
2 that lack heft. The opinions that lack heft are going to  
3 juries because it goes to the weight.

4 And on the 3-dollar opinion, which is an actual -- it is a  
5 restitutive disgorgement opinion, the argument or the  
6 problem is identical.

7 So he says it's \$3 per device and the fault is that it was  
8 saved. So if I save it and I put it in the woods, I get \$3.  
9 If I publish it on the New York Times, I still get \$3. If I  
10 personalize ads with it, it's \$3. If I'm in *Brown* and my claim  
11 is incognito browser stuff unrelated to this, I get \$3; right.

12 The next case they bring in this series of cases they are  
13 bringing, they are going to say it's \$3 if Your Honor blesses  
14 this.

15 When you read the one paragraph that Mr. Lasinski has  
16 explaining why it is \$3 and it is reproduced in its entirety,  
17 at slide 19 -- and really, you can look at slide 20. It's the  
18 same paragraph redlined to what he said in *Brown* -- there is  
19 actually one sentence in his whole report that explains why \$3  
20 is appropriate. It's the blue sentence at the bottom. And it  
just says it's appropriate because it's appropriate.

22 And I deposed Mr. Lasinski -- we put some of his testimony  
23 in the brief -- and he was not able to identify a single factor  
24 that would push that number up or down.

25 Again, if you test the reliability of an opinion to see

1 how malleable it is, that's how you know if it is outcome  
2 determinative. So he said: Well, it doesn't matter how many  
3 times you suffer. It doesn't matter how severe the intrusion.  
4 It doesn't matter what you did with the data. In effect, it is  
5 \$3 regardless.

6           **THE COURT:** Okay.

7           **MR. SANTACANA:** A couple more specific things on each  
8 model if you will indulge me.

9           So with respect to the disgorgement model, the courts in  
10 *Hart, Campbell, Apple iPhone Antitrust* case and *Silva* all  
11 excluded damages models with the same problem.

12          Those were easily cases where the judges -- and Your Honor  
13 did it in *Gamevice versus Nintendo*. It was a patent case with  
14 a similar issue.

15          Judges in those cases could easily have said this goes to  
16 the weight, but the models were just so fundamentally flawed  
17 that it didn't even rise to the level of expert opinion.

18          Anybody -- anybody can just say: "That's your ad revenue,  
19 give it back to me;" right. Their Plaintiffs can get on the  
20 stand and say that. Their lawyers can say that in closing  
21 argument.

22          What did the expert do? What is the expert opinion? How  
23 does he know how much this tiny cog in the ad machine is  
24 contributing to that bottom line? He says it is a but-for  
25 cause. It is just all of it.

1       In addition to that problem, Your Honor, the report relies  
2 really very heavily -- like the whole concept behind it is that  
3 Google studied what might happen if the Incognito mode in  
4 Chrome shut off all third-party cookies entirely.

5       And he said: Well, that's comparable. And Your Honor is  
6 familiar with patent cases and Daubert opinions relating to  
7 comparable market transactions.

8       Sometimes people get excluded for choosing a transaction  
9 that's not comparable. And in his report there's two problems.  
10 One is he doesn't explain why it should be comparable, but two  
11 the lawyers' explanation on why it should be comparable just  
12 doesn't pass the smell test because what he is saying is it is  
13 a but-for cause because in Incognito it would be a but-for  
14 cause.

15       But in Incognito there is no data flowing at all in this  
16 hypothetical world. And in the Plaintiffs' hypothetical world,  
17 it is just Google that's not saving the data. The advertisers  
18 can still save data. They can still see what's going on.

19       Plus, we already live in a world where Google is operating  
20 without the very data that Lasinski says is a but-for cause.

21       Since April 2021 Google is not receiving the exact  
22 receipts from Apple sort of -- from ads served on Apple's  
23 operating system. Google is not getting those receipts at all.

24       So, again, yes, I'm addressing the merits of his opinion  
25 but some opinions are -- lack merit to a degree that makes them

1 unreliable. And I think that is the problem with this piece of  
2 his disgorgement opinion. It's the same problem that these  
3 other cases found.

4 On the 3-dollar payment, Your Honor -- I just want you to  
5 consider this for a moment, the 3-dollar payment is based upon  
6 the Screenwise study that Google does. They pay people and the  
7 people have to fill some things out and they get an app and  
8 they give all of their information. They give all of their  
9 information, their whole phone. Everything the person types on  
10 the phone goes to Google.

11 And Google says: "I'm going to personally identify you.  
12 I'm going to learn things about you. I'm going to give you  
13 surveys, and I'm going to personalize advertising for you. And  
14 here is what I will pay you in exchange."

15 And Lasinski says, well, that's -- you have set a market  
16 value for the data. It's that amount. What he is doing is  
17 setting up a license; right. He is setting up an idea of --  
18 just as the restitution restatement says, what would the  
19 license be for the data if the Plaintiffs had had the chance to  
20 negotiate with Google.

21 So I asked him: If we were at the negotiating table --  
22 the Plaintiffs on one side, Google on the other -- does it make  
23 a difference if there are constraints on what Google can do  
24 with the data?

25 Because remember, WAA is a light switch. You flip it off,

1 I can't use it to identify your personalized advertising. He  
2 said, no, it doesn't make a difference.

3 Does it make a difference if Google publicly discloses the  
4 data? No, it doesn't make a difference. Does it make a  
5 difference -- nothing made a difference, Your Honor. It was \$3  
6 no matter what. That's what he said in his deposition.

7 So, if that's the opinion, again, Plaintiffs can say that.  
8 The Plaintiffs' lawyers can say that in closing argument.

9 Where is the expert opinion? We can all see what Screenwise is  
10 paying people as lay witnesses. We do not need an expert to  
11 tell a fact-finder --

12 **THE COURT:** Well, presumably he will say there is some  
13 significance to that from an expert perspective.

14 **MR. SANTACANA:** He can't.

15 **THE COURT:** Why not?

16 **MR. SANTACANA:** Because it is not in his report.

17 (Pause in proceedings.)

18 **MR. SANTACANA:** In order for him to testify as to --  
19 right --

20 **THE COURT:** In answer to your examination question of  
21 why do you deem it significant.

22 **MR. SANTACANA:** I'm sorry?

23 **THE COURT:** I'm not sure it would be beyond his  
24 report. If he is opining that \$3 is the appropriate figure and  
25 you are suggesting, well, you don't need an expert to say that

1 because they just pulled it out from --

2       **MR. SANTACANA:** Right.

3       **THE COURT:** -- what you just said.

4       **MR. SANTACANA:** With no additional --

5       **THE COURT:** You would say -- and he could not explain  
6 why he would deem the fact that you have identified it in that  
7 fashion to be -- to be of significance from an expert's  
8 analysis perspective. He wouldn't be allowed to do that  
9 because that wasn't elaborated upon in his report?

10      **MR. SANTACANA:** Well, let me -- I will rephrase it.

11      He wouldn't tell me when I asked him and he didn't say why in  
12 his report.

13      **THE COURT:** It is very different, though, than some  
14 hidden opinion that suddenly gets thrown upon you. You know  
15 what his opinion is, and you think his explanation is pretty  
16 feeble. Okay.

17      You are suggesting to me this doesn't even need -- you  
18 don't need -- under Rule 702 you don't need an expert to talk  
19 about this because they are just taking a figure that's  
20 floating around in the Google sphere and they are pointing to  
21 it and saying that.

22      **MR. SANTACANA:** Yeah.

23      **THE COURT:** Okay. I think it would not be  
24 inappropriate for him to elaborate upon -- even -- you can  
25 impeach him and say if he has -- if he comes up and says,

1 "Well, I think this is the most critical figure that one would  
2 have when you are trying to formulate, from an expert's  
3 perspective, what's important."

4 Then you can say, "Well, you didn't tell me that when I  
5 asked you that question in your deposition," fair enough, but  
6 the idea that somehow that is self evident, that it is not  
7 proper subject of expert testimony, I don't quite follow you on  
8 that.

9 **MR. SANTACANA:** Let me try it this way then -- I think  
10 I may have confused the issue -- Lasinski's opinion is  
11 Screenwise pays people \$3 a month so we should pay them \$3  
12 once. He never, by the way, explains why that should be  
13 either.

14 Okay. I understand that's his opinion.

15 **THE COURT:** Very conclusory -- it's a very conclusory  
16 opinion in this regard.

17 **MR. SANTACANA:** I mean, it is -- very conclusory, Your  
18 Honor, is an understatement. Okay. This is his entire  
19 opinion.

20 **THE COURT:** I understand.

21 **MR. SANTACANA:** It is the whole thing.

22 **THE COURT:** On the 3-dollar point.

23 **MR. SANTACANA:** On the 3-dollar point. This man  
24 provides no explanation -- there is no calculation. Why isn't  
25 it \$2? Why isn't it \$4, as Judge Gonzalez Rogers mused with

1 respect to a different expert. Why isn't it 14 percent? Why  
2 isn't it 15 percent?

3 I asked him why isn't it 3 and not 4? He said, "I don't  
4 know. Maybe it is 4."

5 I said, "Hold on a second. You presumably considered 4  
6 and you chose 3." And his answer every time was, "Well, 3 is  
7 appropriate."

8 Why is it appropriate?

9 Because I think it is appropriate.

10 Why do you think it's appropriate?

11 This is right there in the deposition Your Honor. So  
12 that's the fundamental problem with that.

13 I think there is just one more thing I would like to say  
14 about this -- about this 3-dollar opinion, which is that this  
15 hypothetical license that he is setting up, as I was saying  
16 earlier, if that's the exercise that the restatement asks us to  
17 do -- just like in patent, we do it all the time -- to be an  
18 expert opinion, there must be an input not just an output. And  
19 the input can't be a block box.

20 On December 1st there is -- the advisory committee notes  
21 to Rule 702 will make this additionally clear although they say  
22 it is not a change in the law that there is a difference  
23 between a feeble expert opinion and an expert opinion that  
24 doesn't have a foundation at all and is really just  
25 speculation.

1       So he presents this as actual damages. This is what  
2 compensatory damages this class suffered, and he says it's \$3,  
3 and he never says why. That is classic Daubert material.

4           **THE COURT:** Thank you. So on the Daubert point, it's  
5 Mr. Sila.

6           **MR. SILA:** Sila, Your Honor, yes.

7           **THE COURT:** Okay, go ahead.

8           **MR. SILA:** Your Honor, I would like to just begin for  
9 a moment talking about mental anguish, which we have talked  
10 about a bit today and how it relates to the damages analysis  
11 and the motions that are currently pending.

12          First, I want to make clear that mental anguish is not an  
13 element of the CDAFA claim. It is not a part of damages lost.  
14 It doesn't have to be something that Plaintiffs seek in terms  
15 of compensatory damages under that statute.

16          And as much as Google spends time talking about variations  
17 between individuals in terms of their sensation of emotional  
18 distress, we are actually not seeking damages on that basis,  
19 and we don't have to. If Your Honor is interested, I have a  
20 case --

21           **THE COURT:** You would agree that that wouldn't be  
22 subject to classwide --

23           **MR. SILA:** It might but they haven't presented  
24 evidence that shows that variation. I can imagine why you  
25 might think that there would be such variation. We have not

1 submitted a model that's on that basis precisely for that  
2 reason so that we can have a classwide model.

3 The Ninth Circuit in a case called *BP versus Balwani* says  
4 that Plaintiffs are allowed to make choices like that to  
5 abandon models that might raise class certification issues in  
6 order to certify the class and create a classwide damages  
7 model. So that's the first point that I would like to make.

8 Google's most significant argument, I think, is that  
9 Mr. Lasinski -- at least with respect to the disgorgement  
10 opinion, that Mr. Lasinski attributes one hundred percent of  
11 Google's profits to Google's use of supplemental web and app  
12 activity data, its use of (s)WAA off data for whatever  
13 purposes.

14 So the truth is that Mr. Lasinski actually calculates the  
15 money that Google actually earned by using (s)WAA off data in  
16 order to make money, and that's two type of uses, and this is  
17 well grounded in the record from technical experts from both  
18 sides.

19 Scenario one, he calculates and isolates the specific  
20 dollars that Google earned by using (s)WAA off app activity  
21 data to do something called conversion tracking and  
22 attribution. Now that requires saving this app activity data  
23 in a location and then looking back once a later activity  
24 occurs to ask: Well, was this purchase caused by an ad that  
25 Google served recently or was it caused by something else?

1       It is about measuring effectiveness of the ad. So when  
2 Google says that Mr. Lasinski's models are unaffected about  
3 whether Google took the data and buried it out in the woods.  
4 That's not what Google did. And if it did, it would not be  
5 able to make this kind of money.

6       The same thing is true with scenario two which relates to  
7 a related but different kind of revenue generating activity,  
8 which is service and charging for ads.

9       It's not simply saving receipts. This is the data that  
10 Google actually uses in its systems to serve the ads and then  
11 to go back to advertisers and say "Hey, pay me this money."  
12 These are their billing records, and they have detailed  
13 information as we lay out in our -- as we cite in our class  
14 certification motion to the report of Plaintiffs' technical  
15 expert Jonathan Hochman. I believe that request and all of the  
16 data that is included there is at paragraph 130 of his  
17 technical report.

18       So it is simply not true that Mr. Lasinski is attributing  
19 dollars that do not relate to the wrongful conduct in this  
20 case, and it's not true that he is attributing full sweep of  
21 Google's recommendations to a tiny cog in the machine.

22       Now, Google's arguments on this point I personally find a  
23 little hard to follow, and I think I have been able to distill  
24 two types of arguments from Google's arguments today and in the  
25 briefing.

1       One relates to but-for causation. Google says, yes, that  
2 Mr. Lasinski should have considered a but-for world and how it  
3 might have nonetheless made this money in a but-for world where  
4 it doesn't collect (s)WAA off app activity data.

5       That's not the law. California courts are clear that a  
6 disgorgement remedy does not have to depend on but-for  
7 causation. Plaintiffs are entitled to seek every dollar that  
8 Google actually made by using (s)WAA off app activity data.

9 That's what Mr. Lasinski does.

10      And regardless, evidence from both parties' technical  
11 experts supports the conclusion that the dollars that  
12 Mr. Lasinski calculates are the dollars that Google would not  
13 have earned if it had not used (s)WAA off app activity data.  
14 So there is plenty of basis in the record for that argument.

15      And finally, I want to be clear that even if there were  
16 deductions that were appropriate from a disgorgement model, it  
17 is Google's burden to prove that deduction. It is not  
18 Plaintiffs' burden. It is certainly not Mr. Lasinski's.

19      And Google's own cases support this fact. In reply Google  
20 cites a case called *Frank Music Corp.*, the Ninth Circuit case  
21 from 1985. In that case the Ninth Circuit said, quote, "the  
22 burden of attribution" -- and there it's talking about  
23 allocation of profits to non-wrongful causes -- "is the  
24 Defendant's."

25      Now, it's not Mr. Lasinski's burden and Google has not

1 presented evidence that it's capable of making that kind of a  
2 deduction any way.

3 Google also cites to a case called *Moonbug Entertainment*  
4 in which I believe it was Judge Chen --

5 **THE COURT:** Right.

6 **MR. SILA:** -- who looked at an expert's opinion. That  
7 expert's opinion was the Defendant's expert. It was not the  
8 Plaintiffs' expert.

9 Google is free to present evidence of an appropriate  
10 deduction if it believes there is one, but it is not  
11 Mr. Lasinski's job and it is not a basis for the exclusion of  
12 his opinions.

13 Turning to Mr. Lasinski's actual damages model,  
14 Mr. Lasinski explained the basis for his model at length in his  
15 report and at his deposition.

16 He conducted a market based approach. He looked across  
17 the market. He found comparable transactions that actually put  
18 a dollar value on the kinds of data at issue here.

19 I understand that Google has arguments about differences  
20 between the kinds of data that were at issue in those  
21 comparable transactions, in Screenwise, for example. Those are  
22 all arguments that go to weight, not admissibility and can be  
23 the basis of cross-examination if Google so chooses.

24 I think it might be most helpful, Your Honor, is if you  
25 had a specific questions regarding either --

1           **THE COURT:** You know, Mr. Santacana spent a lot of  
2 time on the 3-dollar point. Why don't you talk about the  
3 explanation or lack thereof in Mr. Lasinski's report.

4           **MR. SILA:** Mr. Lasinski's report laid out the detail  
5 of the analysis of the market. He looked at four transactions,  
6 and he described the compensation structures for each of those  
7 transactions and the kinds of data that were at issue in those  
8 transactions.

9           And he looked specifically to try to find Google's  
10 willingness -- evidence of Google's willingness to pay for the  
11 data at issue and users willingness to accept payment from  
12 Google in order to give up their data to Google.

13           And it is almost self evident, Your Honor, that -- and  
14 Mr. Lasinski, in fact, states he relies on Google's own  
15 payments in the Screenwise program as indicative of its own  
16 willingness to pay and indicative of user's willingness to  
17 accept from Google.

18           Now, the truth is in that program and in here Google  
19 actually saved the data at issue. It kept -- it held onto it.  
20 It held it in its logs. It saved the data. It didn't bury it  
21 out in the woods.

22           **THE COURT:** The point that Counsel was trying to make  
23 is with respect to whether or not one needs an expert, if, in  
24 fact, the analysis is as simple as pulling a number from Google  
25 and saying there it is, that's the number, the argument for

1 needing to do that through an expert is the expert presumably  
2 would then explain the reason that we can look at that number  
3 and that it bears significance and it's the one we should all  
4 focus on is in my expert opinion based on the fact that  
5 whatever.

6 And they are suggesting there is no -- there is nothing  
7 like that here. There is only -- there is the number and I  
8 took it because that's what I think is the right number without  
9 an appropriate explanation. So why should I not be troubled by  
10 that?

11 **MR. SILA:** The 3-dollar figure is the conclusion it's  
12 true. If we can just present that conclusion without having  
13 conducted market based approach, then maybe we could do that.

14 Of course, Mr. Lasinski, who has decades of experience  
15 valuing assets of all types in all kinds of industries and  
16 doing analyses just like this, can explain and did explain at  
17 his deposition why the 3-dollar payment in Google's own  
18 willingness to pay is indicative.

19 For one thing, Mr. Lasinski explained that, of course,  
20 Google's actual payments are the best evidence of its  
21 willingness to pay. That is something that he explained in his  
22 deposition, and then it's something that you would need a  
23 valuation expert to do.

24 Now, if Google's position is that we can simply introduce  
25 evidence at trial of the 3-dollar payment and say that's what's

1 appropriate without Mr. Lasinski's expert testimony, then we  
2 would expect them not to object if Your Honor were to exclude  
3 Mr. Lasinski and we try to do that at trial.

4 I don't think that's really the argument that Google wants  
5 to make, and it's -- it certainly doesn't account for the full  
6 analysis that Mr. Lasinski made in his --

7 **THE COURT:** Well, the concern that they have and the  
8 concern that sometimes Daubert is trying to address is you take  
9 something that really doesn't require any expertise and you put  
10 a nice -- you wrap it up in an expert label and that has the  
11 danger of suggesting to the jury that this brilliant person  
12 with all this expertise has come up with this and, therefore,  
13 it is entitled to a great deal of deference.

14 And the concern is a legitimate one that if it really  
15 isn't something you need an expert for, you shouldn't allow an  
16 expert to testify about it.

17 So that's the nature of the argument and it's not a -- you  
18 know, it's a real argument. So why should I not be troubled by  
19 that in this case?

20 Whether or not they would stipulate to let you do whatever  
21 you do without an expert is not really the focus of whether or  
22 not I should let you have this expert say that.

23 **MR. SILA:** Understood, Your Honor. I do want to come  
24 back to the point that Mr. Lasinski conducted on his own  
25 initiative -- well, obviously, you know, he was retained for

1 the purpose. He conducted a market based approach. We didn't  
2 just put this number in front of him and say: "Hey,  
3 Mr. Lasinski, can you go testify about why this 3-dollar figure  
4 is the right one?"

5 He reviewed other market transactions looking specifically  
6 for transactions that are the most comparable, what is the best  
7 possible evidence.

8 And with respect to the Screenwise program in particular,  
9 this 3-dollar payment that Mr. Lasinski relies on is not the  
10 only payment in the program.

11 There are enrollment fees. There are monthly payments for  
12 use of a Screenwise router. Google referred to -- to the  
13 opinion in *Brown*. There are separate fees for browser related  
14 monitoring, and then there are specific 3-dollar payments for  
15 mobile activity and activity on tablets, the bulk of which  
16 occurs on apps.

17 And Mr. Lasinski helps to narrow the focus away from that  
18 market wide -- the market wide scope of transactions -- any  
19 possible transaction that could be out there away from the  
20 various components of the Screenwise program and on  
21 specifically to the relevant and most applicable payment from  
22 the Screenwise program.

23 **THE COURT:** All right. Okay. Thank you very much.  
24 It is very helpful. I will take all that you have said and go  
25 back and work on an order, and I will look at the supplemental

1 materials that you provided to me. Despite my reaction at the  
2 beginning, I will look at them. So, thank you very much.

3 (Proceedings adjourned at 3:09 p.m.)

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3 **CERTIFICATE OF REPORTER**

4 I certify that the foregoing is a correct transcript  
5 from the record of proceedings in the above-entitled matter.  
6

7 DATE: October 10, 2023  
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